

Petitioner Los Angeles Times Communications LLC ("Times") applies for a writ of mandate commanding Respondent Los Angeles Unified School District ("LAUSD" or "the District") to produce records in compliance with the Times' request pursuant to the California Public Records Act ("CPRA"). The court has read and considered the moving papers, oppositions, and reply, and renders the following tentative decision.

A. Statement of the Case

1. The Petition

Petitioner Times commenced this proceeding on October 12, 2012. The Times seeks a writ commanding Respondent LAUSD to produce records in compliance with the Times' request pursuant to the CPRA.

The Petition alleges in pertinent part as follows. For years, the Times has reported on student performance on standardized tests in the District, an issue of importance to the residents of Los Angeles. Based on feedback that the Times has received from its readers, their top concerns include LAUSD, its teachers, student performance on standardized tests, and the school system in general.

Beginning in August 2010, the Times published a series of stories concerning the effectiveness of LAUSD teachers on improving student performance on standardized tests. In researching this topic, the Times obtained seven years of student standardized test scores for individual teachers (school years 2002-2003 through 2008-2009), which the District provided response to CPRA requests.

On April 29, 2011, the Times made a CPRA request for the databases containing the District's Academic Growth Over Time ("AGT") scores for the academic year 2009-2010 (the only year for which AGT scores had been prepared at that point). LAUSD responded by stating that the AGT scores were exempt from disclosure under the preliminary drafts exemption of the CPRA (Gov't Code §6254(a)). The District explained that the AGT scores for 2011-2012 were not being used for teacher evaluations, but the scores would be part of the evaluation process in the future. Thus, the information was exempt under Gov't Code section 6254(c).

LAUSD agreed to and did provide some of its AGT score data to the Times: scores on a school-wide level and individual teacher scores, without any identifying information for individual teachers, or a link to the schools where they taught. Releasing the data in this format rendered it largely useless because it could not be analyzed on a classroom-by-classroom basis. The data averaged all classrooms to arrive at a single score for the entire school, rendering it impossible to determine how students were performing within each classroom.

On October 6, 2011, the Times made another CPRA request, seeking the 2010-2011 AGT scores distributed to K-12 teachers that month, as well as the scores previously provided to LAUSD teachers for the 2009-2010 school year.

On October 17, 2011, LAUSD responded in two letters, denying the requests. In one of the letters, the District claimed that the 2009-2010 AGT scores provided to teachers the previous Spring were exempt from disclosure under Government Code sections 6254(a), 6254(c), and

6255. In the other letter, addressing the AGT scores distributed in October 2011 to K-12 teachers and reflecting the 2010-2011 academic year, LAUSD stated that it would provide the AGT scores but would redact the names of all the LAUSD teachers, asserting that Government Code sections 6254(c) and 6255 exempted these records from disclosure under the CPRA.

On November 16, 2011, the District amended its response and agreed that it would provide the AGT scores for the 2010-2011 school year, but without the names of the K-12 teachers. LAUSD claimed it could redact the names under Government Code sections 6254(c) and 6255.

In January 2012, LAUSD provided the Times with AGT scores for 2009-2010 and 2010-2011, as broken down by the District. The disclosure omitted three specific pieces of information requested by the Times: (1) the names of teachers connected with the scores, (2) the schools where the teachers worked, and (3) a unique identification number that would enable the Times to link teachers to the AGT records previously received. The missing information prevented the Times' from generating a meaningful analysis of the data provided. LAUSD's refusal to identify the schools where the teachers worked was particularly problematic, as it rendered it impossible to segregate the huge amount of data received into usable information.

Ultimately, the District did provide a unique identifier for each teacher in the records provided in January 2012, but the unique identifier numbers did not match the identification numbers previously provided by the District for each teacher. By creating new identifiers, LAUSD effectively precluded the Times from connecting teachers with their AGT scores.

On May 1, 2012, the Times again wrote to LAUSD regarding its failure to produce the requested public records. LAUSD requested additional time to respond.

On August 6, 2012, the Times sent the District another CPRA request, seeking to update AGT score information with 2011-2012 data. LAUSD responded that it was willing to provide teachers and location codes with raw student testing scores, but it would not provide identifying information for teachers in a form that would allow the Times to connect specific teachers to the AGT scores. LAUSD thus has refused to provide AGT scores with individual teacher names, and has refused to provide AGT scores connected to the school where the teacher works.

Since September 12, 2012, the District has given no indication that its position has or will change. The Times alleges that LAUSD will continue to refuse to permit members of the public, including the Times, to inspect or obtain copies of the requested public records, in violation of the CPRA. The parties dispute whether AGT scores are exempt from disclosure under the CPRA.

2. UTLA's Intervention

On January 24, 2013, the court granted United Teachers of Los Angeles ("UTLA" or "Union") leave to intervene. The Complaint-in-Intervention was filed the same day, alleging that the Petition should be denied because AGT scores are exempt from disclosure under the CPRA and/or the right to privacy under the California Constitution.

B. Governing Law

The CPRA was enacted in 1968 to safeguard the accountability of government to the

public. San Gabriel Tribune v. Superior Court, (1983) 143 Cal.App. 762, 771-72. Govt. Code¹ section 6250 declares that “access to information concerning the conduct of the people’s business is a fundamental and necessary right of every person in this state.” The CPRA’s purpose is to increase freedom of information by giving the public access to information in possession of public agencies. CBS, Inc. v. Block, (1986) 42 Cal. 3d 646, 651. The CPRA was intended to safeguard the accountability of government to the public, and it makes public access to governmental records a fundamental right of citizenship. Wilson v. Superior Court, (1996) 51 Cal.App.4th 1136, 1141. This requires maximum disclosure of the conduct of government operations. California State University Fresno Assn., Inc. v. Superior Court, (“California State University”) (2001) 90 Cal.App.4th 810, 823.

As the result of a 2004 voter initiative, this principle of access to government information is enshrined in the state Constitution. Sierra Club v. Superior Court, (“Sierra Club”) (2013) 57 Cal.4th 157, 2013 Cal. LEXIS 5625. Article 1, section 3(b) of the Constitution provides: “[t]he people have the right to full access to information concerning the conduct of the people’s business, and therefore, the meetings of public bodies and the writings of public officials and agencies shall be open to public scrutiny.”

The CPRA makes clear that “every person” has a right to inspect any public record. §6253(a). The term “public record” is broadly defined to include “any writing containing information relating to the conduct of the people’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. §6252(e). The inspection may be for any purpose; the requester’s motivation is irrelevant. §6257.5.

The CPRA defines a “public record” as “any writing containing information relating to the conduct of the public’s business prepared, owned, used or retained by any state or local agency regardless of physical form or characteristics. §6252. This definition covers every conceivable kind of record in the governmental process, and pertains to any form of record-keeping. San Gabriel Tribune v. Superior Court, (1983) 143 Cal.App.3d 762, 774. This includes information stored in an electronic database. Commission on Peace Officer Standards & Training v. Superior Court, (“POST”) (2002) 42 Cal.4th 278, 288. Indeed, the format of information generally does not determine whether it is a public record. Sierra Club, *supra*, 2103 LEXIS at 5630 (geographic information database is public record subject to disclosure at actual cost of duplication).

The right to inspect is subject to certain exemptions found in sections 6254 and 6255, which are narrowly construed. California State University, *supra*, 90 Cal.App.4th at 831. In pertinent part, public records exempt from disclosure if they (1) are personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy (§6254(c)), and (2) fit within a “catch-all” exemption where the facts of the particular case demonstrate that the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record (§6255). The burden of demonstrating that an exemption applies lies with the governmental entity. §6255.

A petition for traditional mandamus is appropriate in actions “to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station....”

¹All further statutory references are to the Government Code unless otherwise stated.

CCP § 1085. This includes actions to compel compliance with CPRA. §§ 6258, 6259. No administrative record is required for traditional mandamus. The court must uphold the agency's action unless it is "arbitrary and capricious, lacking in evidentiary support, or made without due regard for the petitioner's rights." Sequoia Union High School District v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195.

C. Statement of Facts²

²The court has ruled on the parties' written objections (placing an "S" for "sustained" and "O" for "overruled" on the District's objections), interlineating the original evidence where an objection was sustained.

The Times asks the court to judicially notice various articles on the significance of value-added assessment of teacher performance (Wilcox Decl., Exs. GG, HH, II, JJ, KK, LL, MM). In a supplemental filing, the Times also asks the court to judicially notice the existence of three other documents (Exs. NN, OO, and apparently), which also concern the significance of value-added assessment.

The court can judicially notice the existence of a website, but may not judicially notice the truth of their content. Searles Valley Minerals Operations, Inc. v. State Board of Equalization, (2008) 160 Cal.App.4th 514, 519. The court may also judicially notice the existence of news articles and magazines. *See Seelig v. Infinity Broadcasting Corp.*, (2002) 97 Cal.App.4th 798, 807, n.5. Although there is no cited case on point, it seems reasonable that the court can judicially notice the existence of scholarly articles published on a website instead of a hard copy, and that the authors hold the opinions stated therein. *See In re Jordon R.*, (2012) 205 Cal.App.4th 111, 127-30 (judicial notice of literature for the purpose of finding the existence of a controversy). The court may not judicially notice the truth of their content, fact, opinion, or argument. Only the existence of the pertinent exhibits on the listed websites is judicially noticed. Ev. Code §452(h).

UTLA asks the court to judicially notice (1) a document entitled "Frequently Asked Questions" posted on the District's website (Demain Decl., Ex. 3), (2) a MetLife Survey of the American Teacher dated February 2013 and printed from MetLife's website (Demain Decl., Ex.5), and (2) an article from the May 2011 edition of the Notices of the American Mathematical Society, printed from that Society's website (Demain Decl., Ex.7).

The existence of the article (Ex. 7) is judicially noticed. Ev. Code §452(h). The existence of the Frequently Asked Questions printed from the District's website (Ex. 3) also is subject to judicial notice. However, the truth of its content is not. That content is inadmissible hearsay as to the Times, and is not admissible against the District either unless it was authored by a person authorized to do so. *See* Ev. Code §1222. As the court has no evidence on the authorship of the Frequently Asked Questions, it is judicially noticed for its existence, but not the truth of its content.

Finally, UTLA offers the MetLife Survey to show a general decline in teacher morale nationwide. The Times objects that this decline is irrelevant, having nothing to do with value-added analysis and AGT scores. While it is true that documents subject to judicial notice must also be relevant, and the relevance to this case of general nationwide teacher morale is dubious,

1. AGT

Several years ago, the District created a metric known as AGT, which allows the District to track, measure, and link to specific teachers the achievement of students on California Standards Tests ("CSTs") over time. AGT permits examination of the impact of schools and educators on student learning outcomes and uses a "value-added methodology" that controls for external factors which often influence student test results.

The District spent the 2010-11 and 2011-12 school years investigating, planning, researching and developing AGT followed by extensive testing of the statistical model. The AGT model uses the CSTs combined with student demographic data to create predictions for a student's learning or "individual growth." The predictions are customized to each student taught by a teacher, which allows for a fair comparison of student learning for teachers and schools serving different student populations. The predicted results are then compared to the actual results in order to calculate the value-added estimate, which can be calculated for individual teachers, grade-levels, schools, and specific student populations (e.g., students with disabilities, English language learners).

AGT is intended to provide a better picture of student learning because it compares a student's performance to his/her own expected performance rather than comparing groups of students from one year to different groups of students the following or preceding year. Each teacher, grade level, and school receives an AGT estimate aligned to one of five levels of performance: (1) far below predicted, (2) below predicted, (3) at predicted, (4) above predicted and (5) far above predicted.

Over 14,000 teachers of LAUSD have AGT results, which is approximately 50% of the LAUSD classroom teacher population. A teacher's AGT results evaluate how his/her teaching performance in the classroom impacts the academic growth of students for CST tested subjects. Each teacher is given an overall rating from 1 (low) to 5 (high) for the school year, and an overall AGT score based on the average for the last three years. Teachers may receive an overall AGT score higher than 5 if the teacher has had a strong positive impact on student learning, and conceivable below 1 if the teacher had an extreme negative impact.

In addition to their overall score, teachers receive a color designation. "Blue" means that teacher's impact on students' academic growth over time is "Far Above Predicted." "Green" means "Above Predicted." "Gray" means "Within the Range of Predicted." "Yellow" means "Below Predicted." "Red" means "Far Below Predicted." The District is 95% confident that the AGT results fall within the confidence interval outlined in each teacher's AGT report.

AGT school reports reflecting the school's AGT results are available to the public on the District's website. Since 2011, LAUSD has posted the AGT results for more than 650 schools. From the AGT school reports, parents and the community can see the impact of the school on the academic growth of students at both the school and grade level.

the better course with all the exhibits is to judicially notice them for what they are worth. The request is granted as to the MetLife Survey, but again only as to its existence and not its truth. Ev. Code §452(h).

The District asks the court to judicially notice various filings (Exs. 1-4) from Doe v. Deasy, ("Deasy") LASC No. BS 13604. The request is granted. Ev. Code §452(b).

AGT estimates are also provided for specific groups of students (e.g., by gender, race, English learner status, special education status, and participation in free or reduced-lunch program as a proxy for economic status), by grade (for grades 2 through 11), and for all subjects which have a CST.³

2. The District/Union Agreement

Under the Stull Act (Education Code section 44660 *et seq.*), school districts are required to evaluate teacher performance as it reasonably relates to student progress toward District standards and State standards for pupil achievement, as measured by State-adopted criterion-referenced student testing results as measured by the CSTs.

The Stull Act requirement was the subject of the Deasy litigation in this court, resulting in the issuance of a writ of mandate commanding the District to include student progress in CSTs as part of the teacher evaluation process. The court ruled that (1) the inclusion of student progress in CSTs in evaluations could be undertaken directly or indirectly, and (2) the use of AGT scores would be one method by which the District could comply with the Stull Act.

The District and the Union negotiated an agreement (the “Agreement”) to comply with the writ, and the District filed two writ returns setting forth District compliance. The Agreement provided that the District would use various student performance data in the teacher evaluation process, including (a) the historical CST results of the teacher’s previously-assigned students, (b) the overall CST results for the pertinent subject matter, grade levels/ departments/school-level, (c) the historical CST results of the teacher’s currently-assigned students, and (d) the school-level CST and AGT results of students for all teachers at the school whose students participate in the same CST tests. The Agreement also provided that “individual [teacher] AGT scores are to be used solely to give perspective and to assist in reviewing the past CST results of the teacher, and shall neither form the basis for any performance objectives/strategies nor be used in the final evaluation.” Bowes Decl., Ex. 1, ¶1.3. The permissible student performance data and other measures, including classroom observation results, would then be considered in the teacher’s Final Evaluation Form. Bowes Decl., Ex. 1, ¶2.0.⁴

The Agreement further stated that the AGT reports of the teachers would be confidential:

“Confidentiality of Individualized CST/AGT Test Results: CST/AGT scoring reports that are linked to names of individual employees shall be treated as a confidential personnel record, due in part to their use in the employee performance evaluation system. The District will defend that principle in court as the occasion arises.” Bowes Decl., Ex. 1, ¶3.0.

³Those subjects are: (1) Grade 3-11 English Language Arts; (2) Grade 3 — 8 General Math; (3) Algebra I; (4) Geometry V; (5) Algebra II; (6) Science Grade 5; (7) Science Grade 8; (8) Integrated Science; (9) Biology V; (10) Chemistry; (11) Physics V; (12) Grade 8 Social Science; (13) World History; and (14) U.S. History.

⁴The Agreement does not prohibit the use of teacher AGT scores in personnel actions such as promotions, assignments, transfers, and terminations.

3. The Times' CPRA Requests

a. The Initial Database

On September 3, 2009, Times reporters submitted a CPRA request to the District seeking the individual student CST scores for the school years 2002/2003 through 2008/2009, demographic information about the students, a "crosswalk" linking the students to their teachers and a second "crosswalk," a Professional Assignment Information Form ("PAIF"),⁵ linking the teachers to their schools and providing demographic information on the teachers. The Times asked for these forms for the purpose of obtaining additional information to connect the value-added scores that the Times had calculated for each teacher to the teacher's school and to evaluate whether the demographics of the teachers had an effect on their scores.

The Times and LAUSD exchanged a series of emails and letters addressing LAUSD's compliance with the request. The District ultimately complied with the Times' request and provided student test data, along with teacher information that would enable the Times to connect teachers and students. This was the information that the Times needed in order to prepare its value-added analysis for the 2009-2010 school year.

Beginning in August 2010, the Times published a series of articles concerning the effectiveness of LAUSD teachers in improving student performance on standardized tests. In researching this topic, reporters at the Times obtained seven years of student CSTs for the classrooms of individual teachers (school years 2002-2003 through 2008-2009), which LAUSD previously provided in response to CPRA requests. The Times used this information to perform its own value-added study for these teachers. At the time, the District was not performing any value-added analysis of its own. The Times' original database consisted of a value-added analysis for approximately six thousand teachers (third, fourth, and fifth-grade).

The Times subsequently published many articles on the topic of value-added models as a means of evaluating teacher performance, as well as related topics. On May 7, 2011, the Times updated its database to include its own value-added analysis for approximately 11,500 LAUSD teachers, covering school years 2004-2005 through 2009-2010. On May 7, 2011, the Times published an article concerning its updated database of value-added ratings for Los Angeles elementary school teachers.

b. The April 2011 Request

After the Times began publishing articles on value-added performance, the District created AGT. In April 2011, LAUSD disclosed AGT scores for individual schools, and announced that teachers would be provided with their individual AGT scores in the near future, but that teacher AGT scores would not be released to the public.

On April 29, 2011, a Times reporter made a CPRA request for the databases containing AGT scores for the academic year 2009-2010, the only year for which AGT scores had been prepared.

On May 27, 2011, LAUSD responded to the CPRA request by email, stating that its AGT

⁵The PAIF was a form required by the Department of Education providing basic information regarding all California teachers, such as courses taught, demographics, and compliance with federal standards. The form is no longer in use.

scores were exempt from disclosure under the preliminary drafts exemption of the CPRA (§6254(a)). The District admitted that the teacher-identifying AGT data for 2011-2012 was not being used for teacher evaluations, but claimed that the data would be part of the evaluation process in the future, and thus was exempt under section 6254(c). The Times' CPRA request was denied.

LAUSD did provide some AGT score data for teachers, but the production was limited to aggregate teacher scores on a school-wide level, and individual scores without any identifying information that would make it possible to determine which teacher had been given a particular score (including the schools where the unidentified teachers worked).

c. The October 2011 Request

On October 6, 2011, Times employees made another CPRA request, seeking the 2010-2011 AGT scores that were being distributed to K-12 teachers that month, as well as the scores provided to teachers for the 2009-2010 school year.

On October 17, 2011, LAUSD responded in two letters denying the CPRA requests. In one of the letters, the District claimed that the teacher AGT scores for 2009-2010 provided to teachers the previous Spring were exempt from disclosure under sections 6254(a), 6254(c), and 6255. In the other letter, addressing the 2010-2011 AGT scores distributed to K-12 teachers in October 2011, the District agreed to provide the AGT scores but stated that it would redact the names of all LAUSD teachers, asserting that sections 6254(c) and 6255 exempted these records from disclosure.

In January 2012, LAUSD provided AGT scores for 2009-2010 and 2010-2011. The disclosure omitted three specific pieces of information that the Times had requested: (1) the names of teachers connected with the scores, (2) the schools where the teachers worked, and (3) a unique identification number that would enable the Times to link teachers to the AGT records the Times previously had received.⁶

d. The August 2012 Request

On August 6, 2012, a Times reporter sent the District another CPRA request which sought 2011-2012 AGT scores. The parties' counsel subsequently discussed the District's position. LAUSD's attorney stated that while the District was willing to provide teachers and location codes with raw student testing scores, it would not provide identifying information for teachers in a form that would allow the Times to connect specific teachers to AGT scores.

The District reiterated in a subsequent email that "LAUSD is willing to discuss this issue with the Times to ensure that the Times has public record information it needs to run its value-added scores for the 2010-11 school year, if that is the Times' objective." The attorney added that LAUSD would only agree to release the underlying information used to compile the AGT scores, but not the AGT scores themselves.

The parties' counsel had another telephone conversation regarding the CPRA requests

⁶The unique identifier would enable the Times to distinguish between teachers with identical or similar names, which it deemed necessary for a database consisting of more than 12,000 names.

some days later. During that conversation, the District's attorney mentioned the Deasy litigation and the fact that it recently had resulted in a judgment and writ of mandate. He expressed LAUSD's belief that the outcome of the case prohibited the District from releasing teachers' AGT scores.

On August 30, 2012, the parties' counsel discussed the Deasy case again. The Times' lawyer noted that the court's decision in Deasy states that the AGT scores are not used to evaluate teacher performance. She requested that LAUSD comply with its CPRA obligations and produce the teacher names with corresponding pseudo-identification numbers (to connect those names with AGT scores already released) and location codes for the three years for which data has been released.

The District's lawyer responded that "AGT was designed for the express purpose of evaluating teacher contributions towards student progress. For the past two years or so, the District has been working to include AGT into the formal evaluation process. That matter is in negotiations right now. The fact that negotiations have not been completed does not mean that the AGT scores will not be included in the evaluation process."

On September 12, 2012, LAUSD's attorney sent an email to the Times' attorney stating that the District refused to provide the teachers' names in connection with pseudo-identification numbers which would enable the Times to connect teachers with their AGT scores, citing section 6254(c) and 6255.

4. The Superintendent's Concerns About Disclosure

The District's Superintendent implemented the Agreement and the court's order in Deasy by issuing a Policy Bulletin 5335.1, "Performance Evaluation for UTLA Bargaining Unit Personnel." Bulletin 5335.1 provides that the District shall treat teacher evaluations as a confidential personnel record. Deasy Decl., Ex. 1 at 11.

In the Superintendent's view, public policy considerations favor maintaining the confidentiality of teacher evaluations. On behalf of the District, he is concerned about disclosure of teacher AGT scores for the following reasons.

The recruitment and retention of a highly-effective teaching staff is critical to the learning progress of students and the success of LAUSD. It is critical for the District to be able to attract and retain top quality teachers. The release of evaluation data for individual teachers will either discourage recruitment of quality candidates and/or cause existing teachers to leave the District. Many of the best teaching candidates and teachers are modest, and do not want to be in the public spotlight or to have their day-to-day work performance subjected to public debate.

The disclosure of performance evaluations and negative ratings may spur unhealthy competition and discord among teachers. This would be counter-productive and demoralizing to some teachers. In contrast, the confidentiality of teacher evaluations helps maintain positive working relationships among the teaching staff.

The disclosure of teacher AGT scores would undermine the instructors' authority. In order for a teacher to be an effective instructor, the teacher must be respected by his or her students and the students' parents/guardians. If teacher scores were disclosed, parents and students alike would lose confidence in these teachers. The disclosure also would undercut the teachers' ability to receive and accept guidance and perform their jobs.

The confidential nature of teacher performance ratings allows the District to maintain a balance of higher performing teachers throughout the District. A balanced assignment of the teaching staff is essential to the operations of the District. It is human nature for parents to want to insist on having teachers with the highest performance ratings. If parents had access to the teacher AGT scores, they could be expected to argue for the assignment of their children to the highest-performing teachers, and not to the lower-rated teachers.

Dissemination of teacher AGT scores would create issues in the District's teacher dismissal process. If poor-performing teachers were to gain improper access to the performance ratings of other teachers, the integrity of our dismissal process - which is designed to reduce the number of ineffective teachers and ensure a highly-skilled teaching staff - would be jeopardized since the affected teachers would be able to claim access to this information outside of the regular administrative process and unfairly compare their performance ratings with those of their peers.

5. Rothstein's Opinion

The Union presents the expert opinion of Jesse Rothstein ("Rothstein"), a labor economist with a specialty in education policy who was asked to testify on the scientific evidence regarding the validity of AGT as a measure of teacher effectiveness, the purpose behind incorporating AGT or value-added scores into teacher evaluations, and the likely impact of releasing AGT scores to the public. Rothstein opines in part as follows.

a. The Value-Added Model

The AGT model is an example of a broader class of statistical models known as "value-added" models, which are designed to estimate the impact of teachers on student achievement from student test scores.

Value-added modeling starts from the premise that effective teachers cause their students to learn more, and this increment of learning should be manifested in the students' standardized test scores. This is not simply done by measuring a teacher's effectiveness by looking at his or her students' end-of-year test scores. A valid estimate of a teacher's effectiveness needs to distinguish the teacher's own impact from all of the other influences on his or her students. Student achievement is affected by many factors other than the teacher, including (1) the student's own ability; (2) the support for learning that the student receives at home, (3) family characteristics such as income and language use, (4) school factors such as class sizes, curriculum, and resources, (5) instructional time, (6) security, (7) the availability of aides and tutors, (8) the student's health, and (9) family events (*e.g.*, parental divorce). Moreover, these factors are not evenly distributed across classrooms.

Value-added models are statistical methods that have in common the underlying goal of distinguishing instructional impacts on students' test scores from the effects of other factors. Value-added models usually use the previous year's score as a summary for many of the hard-to-measure outside influences. The simplest value-added model would compare students' end-of-year standardized test scores with the same students' scores on the previous year's test. It would classify a teacher as effective if the students achieved higher than average year-over-year test score gains, and ineffective if the students achieved below average gains. More sophisticated

models compare other student populations, classifying teachers as effective if their students tend to earn higher scores than other students with the same prior year scores. Most value-added models also control for a few other student characteristics, such as race, gender, and disability. The value-added model then assumes that any other variation across classrooms in student end-of-year outcomes, beyond that which can be attributed to the specified control variables, is due to the teacher.

The AGT model is a specific implementation of a value-added model. The AGT model, like many other models, uses the student's prior-year score and the other control variables to form a prediction of the student's end-of-year score.

b. Validity of Value-Added Models

While value-added models all try to distinguish the teacher's impact from other factors, they are all unsuccessful to some extent. It is well established that value-added scores reflect factors other than teachers' impacts on student test scores, though the magnitude of this "bias" remains uncertain. Education research literature supports the following conclusions regarding the validity of value-added estimates: (1) value-added estimates are highly unstable from class to class and year to year; (2) teacher value-added ratings are significantly affected by differences in the students who are assigned to them; (3) value-added ratings are sensitive to differences across teachers in their instructional focus, and give higher scores to teachers who "teach to" the end-of-year test than to equally effective teachers who focus their efforts on other forms of learning that may be more important in the long run; (4) value-added models are particularly limited in their ability to support comparisons between teachers working in different schools; and (5) there are important dimensions of teacher effectiveness that are not captured by student test scores. Although there is disagreement in the literature as to the extent to which these issues distort value-added as an estimate of teacher effectiveness, there is widespread agreement that these issues are common to all value-added models.

c. The Effects of Value-Added Scores on Teacher Evaluations

There is little evidence about the effects of using value-added models in teacher evaluation. By analogy, the few studies of teacher pay-for-performance policies, where teachers were eligible for bonuses based on high value-added scores, have not been promising. The studies have found that bonus eligibility has no effect on teachers' measured value-added.

Social scientists have long experience with quantitative performance measurement in a variety of settings. One of the conclusions from this experience is Campbell's Law: "The more any quantitative social indicator is used for social decision-making, the more subject it will be to corruption pressures and the more apt it will be to distort and corrupt the social processes it is intended to monitor" When particular quantitative performance measures are taken too seriously, one inevitably sees behavior respond to the specific measure rather than to the ultimate goal. Sometimes this behavior simply corrupts the measure, making performance look better than it really is. But often it is actively destructive, reducing true performance as effort is redirected toward influencing the outcome of the measure and away from contributions to true performance.

Thus, when test scores become the goal of the teaching process, they both lose their value as indicators of educational status and distort the educational process. For example, one study

documented that when schools were evaluated based on student proficiency, teachers focused classroom attention on students who were near the proficiency threshold and neglected those high above or below the threshold. As another example, a study showed that schools used student suspensions to affect their score -- students who had low prior scores and were caught fighting were more likely to be suspended when the fight occurred just before test.

Evidence indicates that school-based accountability has led to higher measured student proficiency. But much or all of this appears to reflect "gaming" behavior rather than true increases in achievement. Studies that compare school performance on state accountability tests to those on alternative tests that are not used for accountability find that little or none of the improvement observed in the accountability system carries over to alternative tests, even for the same subjects.

d. Public Release of AGT Scores

There has been no research on the consequences of releasing value-added scores publicly. However, the imprecision and potential bias of value-added scores, as well as their limited informational value when considered in isolation, makes them a misleading measure of teacher effectiveness. The limitations in such scores would not be apparent to people who lack training in advanced statistics. Moreover, few people have experience with quantitative information as imprecise as value-added scores. There would be a general tendency of believing their validity based on the "scientific" aura surrounding them.

The public release of the AGT scores also would create an incentive for teachers to behave in ways that distort future scores, in keeping with Campbell's Law, such as cheating, teaching "to the test," avoiding students who will not aid a teacher's AGT score, and other undesirable outcomes. These behaviors would diminish the usefulness of the CST exam as an indicator of student progress and of teacher or school effectiveness.⁷

5. The Times' Studies

The Times presents studies to show the controversy over value-added models. With respect to release of aggregate, as opposed to individual, teacher AGT scores, one expert explained, "because there is greater variation in the quality of instruction within schools than between them, it is essential to report data at the classroom level for evaluation purposes." Times Ex. GG at 180.

There are studies showing that value-added calculations are a reliable indicia of teacher effectiveness. One early study published by The Thomas B. Fordham Foundation concluded: "Value-added assessment can be used to appraise fairly and accurately school and system performance regardless of differences among entering students." Times Ex. HH at 188. The authors explained:

"Value-added assessment is a statistical tool that can provide an objective answer to questions of teacher effectiveness. Technically, it is a method of

⁷The Union also presents declarations from three teachers, all of whom express concern about the validity of the AGT scores and concern about their public disclosure.

education data analysis that summarizes annual gains in student achievement. Applied to the aggregate scores of students taught by a given teacher, however, it becomes an indicator of teacher effectiveness — one based not on traditional input indicators such as training and experience but on demonstrated results, i.e., student learning. It is a measure of - educational effectiveness that promises to revolutionize education.” Ibid.

The authors concluded:

“Although it employs complex statistics, value-added assessment creates a simple but enormously important change in the educational landscape. It enables parents, taxpayers, and education decision-makers to see for themselves whether schools are working. It does so by greatly simplifying the process of interpreting reports of school effectiveness. Of course, it also provides a means of assessing teacher quality and, potentially, of the programs that train teachers.” Id. at 193.

In 2005, Prof. Theodore Hershberg explained that “because value-added assessment tracks the same students over time — thus accounting for family and neighborhood characteristics that so strongly bias absolute test scores — educators are not penalized for circumstances beyond their control.” Times Ex. GG at 181. He opined that with value added scores, “teachers have rich diagnostic information to improve their instruction, and administrators have an empirical basis for evaluating teacher effectiveness.” Ibid.

Most recently, the Bill and Melinda Gates Foundation financed the Measures of Effective Teaching (“MET”) Project to conduct an analysis of various methods of evaluating and improving teacher performance. In January 2013, the MET Project issued its Final Findings, along with Guiding Principles. The Guiding Principles began by noting that “[o]ur prior reports tested, and ultimately supported, the claim that measures of teaching effectiveness could be valid and reliable.” Times Ex. LL at 0245. It explained, “We have tested the validity of all measures in the MET project and found that students learn better in the classrooms of teachers with better observation scores, better student survey results, and prior success raising student test scores (adjusted for students’ different starting points).” Id. at 0249. The Final Findings concluded: “We can unambiguously say that school systems should adjust their achievement gain measures to account for the prior test scores of students. When we removed this control, we wound up predicting much larger differences in achievement than actually occurred.” Id. at 0224.

D. Analysis

The Times seeks the individual teacher AGT scores maintained by the District. It wants access to individual teacher AGT scores so that parents and the public can assess whether a particular teacher is struggling. Op. Br. at 9. Access to teacher names connected to AGT scores will enable parents to identify patterns in which teachers and schools consistently receive low AGT scores, and patterns in student achievement with that teacher. Ibid.

The Times, and the public, have access to AGT scores by grade, school, and student population. The District and Union implicitly acknowledge that individual teacher AGT scores

are public records, but contend that they are exempt as personnel records (§6254(c)), and under the catch-all exemption (§6255).

1. The Personnel Records Exemption

The District and Union contend that teacher AGT scores are exempt from disclosure under section 6254(c), which exempts “[p]ersonnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” LAUSD and UTLA must establish both that AGT scores are “personnel records” within the meaning of Section 6254(c), and that the disclosure of such records would be an unwarranted invasion of teachers’ personal privacy.

In determining whether a record is exempt under the CPRA’s personnel file exemption, courts apply a three-step analysis:

As a threshold matter, the court must determine whether the records sought constitute a personnel file, a medical file or other similar file. If so, the court must determine whether disclosure of the information would “compromise substantial privacy interests; if privacy interests in given information are *de minimis* disclosure would not amount to a ‘clearly unwarranted invasion of personal privacy[.]’” Lastly, the court must determine whether the potential harm to privacy interests from disclosure outweighs the public interest in disclosure.” Versaci v. Superior Court, (2005) 127 Cal. App. 4th 805, 818; BRV, Inc. v. Superior Court, (2006) 143 Cal. App. 4th 742, 755.

Since disclosure is favored, the definition of “personnel record” must be narrowly construed. *See California State University, supra*, 90 Cal.App.4th at 831.

a. Are Teacher AGT Scores Part of the Teacher’s Personnel File or Other Similar File?

The first inquiry is whether the teacher AGT scores are part of the teacher’s personnel file or other similar file.

In 2010, the District did not have a value-added system. It provided CST student scores and a link to teachers which the Times then used to create and publish its own value-added model for LAUSD teachers.

The District then developed AGT. The teacher AGT score contains aggregate information about student performance in the teacher’s class.⁸ The District was required by the Stull Act and this court’s mandamus writ to consider student CST progress in its evaluation of

⁸Because the student information in a teacher’s AGT score is aggregated and not broken down by individual student, UTLA’s argument that AGT scores are pupil records exempt from disclosure under Education Code sections 49076(a) is not well taken. *See UTLA Opp.* at 2, n.2. A “pupil record” is defined in Education Code section 49061(b) as information “directly related to an identifiable pupil.” The teacher’s AGT score does not identify any particular pupil, and therefore is not a pupil record protected from disclosure.

teachers, and LAUSD entered into negotiations with the Union to do so. These negotiations resulted in the Agreement, which requires the use of CST scores (and other information) in teacher evaluations, but AGT may not be used in the final evaluation of a teacher, or as the basis for a performance objective/strategy for the teacher. Instead, AGT scores may only be used “to give perspective” and assist in reviewing CST results.⁹

In short, the teacher’s AGT score is a compilation of data on student performance in the teacher’s classroom that is used during the year-long evaluative process for the teacher, but not for the teacher’s actual evaluation. The scores reflect how the teacher’s teaching impacts the academic growth of his or her students. The rating and color-coding system reflects the District’s assessment of the expected progress of students and teacher performance.¹⁰

Both UTLA and the District agree that AGT scores are not directly used to evaluate teacher performance. In its motion to intervene, UTLA admitted that “[i]ndividual AGT scores (as distinguished from the school-level AGT results) are to be used solely to give perspective and to assist in reviewing the past CST results of the teacher, and shall neither form the basis for any performance objectives/strategies nor be used in the final evaluation” (emphasis added). The District asserts that individual teacher AGT scores are used to evaluate teacher performance, but then concedes that they are used only in the process. Dist. Opp. at 2.

The mere fact that teacher AGT scores are not used to evaluate teachers does not necessarily mean they are not personnel or other similar records. While performance evaluations are considered personnel records, the converse is not necessarily true. Just because a record is used only in the evaluation process, and not in the evaluation, does not mean it is foreclosed from constituting a personnel record.

In Versaci v. Superior Court, (“Versaci”) (2005) 127 Cal.App.4th 805, on which both the District and Union rely, the court considered disclosure under the CPRA of personal performance goals drafted by the superintendent of a community college district. *Id.* at 810. The court noted that the CPRA was modeled after the federal Freedom of Information Act (“FOIA”) (5 U.S.C. §552 *et seq.*) And section 6254’s exemption for personnel or other similar files is substantively identical to FOIA’s Exemption 6. *Id.* at 818. The court noted that Congress’ primary concern in drafting Exemption 6 was to provide for the confidentiality of personal matters. *Id.* at 819. To qualify for protection, a document did not need to contain “intimate details,” or “highly personal” information. Instead, noting the Supreme Court decision in Department of State v. Washington Post Co., (“Washington Post”) (1982) 456 U.S. 595, 599-600, Exemption 6 was intended to cover detailed government records which can be identified as applying to an individual. *Id.* at 819. The Versaci court noted that employee evaluations fall within Exemption 6, and held that the superintendent’s personal performance goals constitute a personnel file or other similar file under section 6254(c). *Ibid.*

In Department of the Air Force v. Rose, (“Rose”) 425 U.S. 352, the Supreme Court

⁹The score may not be attached to the teacher’s planning sheet. Deasy Decl., Ex.1 at 7.

¹⁰A teacher’s AGT score is potentially available for use in the “non-reelection” of probationary teachers, teacher terminations, and for promotional opportunities, but there is no evidence that the District actually uses AGT scores for those purposes.

addressed a FOIA request for disclosure of case summaries from cadet ethics hearings at the Air Force Academy. The Court held that Exemption 6 did not make personnel files wholly exempt from disclosure. *Id.* at 353-54. In so ruling, the high court noted that Exemption 6 was intended to cover detailed government records on an individual which can be identified as applying to that individual. *Id.* at 376. In this regard, Congress intended to protect the confidentiality of personal matters without critical application of the definition of a personal file. *Id.* at 376, n.14. The ethics case summaries lacked the attributes of a "personnel file" as that term is commonly understood. While the records implicated privacy values, they did not contain "vast amounts of personal data" concerning the individual cadet. *Id.* at 377. Nor was access to the files drastically limited as is customarily true for personnel files, which are limited to supervisory personnel, frequently excluding the individual himself. *Ibid.* Consequently, the records were "other similar files" under Exemption 6. *Id.* at 353-54.

In *Washington Post*, the Supreme Court dealt with a newspaper's FOIA request for State Department documents indicating whether certain Iranian nationals held valid United States passports. 456 U.S. at 595. This information satisfied the "similar files" phrase in Exemption 6. In so holding, the Court relied on *Rose* to note that Congress' primary concern in Exemption 6 was to provide for confidentiality of personal matters. *Id.* at 599-600. Congress did not mean to limit Exemption 6 to a narrow class of files containing only a discrete type of personal information. *Id.* at 602. Rather, the Exemption covers detailed government records on an individual which can be identified as applying to that person. *Ibid.* Information not related to a particular person would not satisfy the threshold request. *Id.* at 602, n.4. A proper analysis of the Exemption will take into account the fact that personnel and medical files will contain much information about a person that is not intimate. *Id.* at 600.

The lesson from *Rose* and *Washington Post* is that the term "personnel file" as used in Exemption 6, and therefore section 6254(c), includes personal data about an individual person to which access generally is restricted to the employee's supervisors. Not every document in a personnel file needs to contain intimate information about that person, and the primary concern in the Exemption is to protect privacy rights, not to create a narrow class of exempt files. To the extent that a document contains information about an individual that is subject to privacy issues, it also may qualify as an "other similar file."

Employee performance evaluations fall within the ambit of Exemption 6, and section 6254(c). See *Versaci, supra*, 127 Cal.App.4th at 819 (superintendent's personal performance goals constitute personnel or other similar file). The reason is that performance evaluations contain an assessment of work performance which, even if favorable, is personal information for the employee. See *Clemins v. Department of Treasury*, (D.D.C. 1977) 457 F.Supp. 13, 15; *Ripskis v. Department of Housing and Urban Development*, (D.C. Cir. 1984) 746 F.2d 1, 10 (agency's employee evaluations were personnel file documents under Exemption 6).

Applying this case law to the District's teacher's AGT scores, there are facts from which one could conclude that the scores are part of the teacher's personnel file or other similar file. The score is part of an annual "AGT Teacher Report." Lim Decl., Ex. 1. The report is addressed to the teacher and discusses "your impact on the academic growth of students," the "results of your work with all of your students," "your academic growth over time." *Ibid.* The score is the teacher's score based on his/her students' achievement, not the students' scores. Thus, the AGT

scores are a metric of the teacher's job performance that is used in the evaluative process for the teacher. The report constitutes the District's judgment regarding the expected progress of students and teacher performance. The District also treats the teacher's report as confidential.

On the other hand, there is evidence from which one could conclude that teacher AGT scores are not part of a personnel file or similar file. There is no personal or intimate information about the teacher in the teacher report. The teacher's AGT score is based on student performance, not the teacher's performance, and the student test scores and other factors on which it is based all are publicly available.¹¹ The report is not used in the annual performance evaluation of the teacher.

Pursuant to Rose and Versaci, the better course is to treat a teacher's AGT report as part of the personnel file or other similar file. The purpose of section 6254(c) is to protect the confidentiality of personal matters without critical application of the definition of a personal file. ~~The teacher's AGT scores contain the District's calculation of the teacher's value-added performance. The teacher's AGT report is too close to a performance evaluation not to be considered a personal record, even if it is not used for a teacher's final evaluation. This conclusion enables the court to evaluate the more important factor of whether the teacher AGT scores are confidential personal matters subject to privacy analysis without having to classify the document.~~

The Times relies on POST and Int'l. Federation of Professional & Technical Engineers, Local 21, AFL-CIO v. Superior Court, ("Int'l. Federation") (2007) 42 Cal. 4th 319. Op. Br. at 4-5. However, both cases concern a distinguishable statutory scheme (Penal Code §§ 832.7, 832.8) in which peace officer personnel records are expressly defined and protected as confidential.

In POST, the California Supreme Court addressed the CPRA disclosure of names, employing departments, and dates of employment of peace officers. 42 Cal. 4th at 289. Penal Code section 832.8 defined peace officer personnel records as confidential and listed the types of information included within such records. Ibid. The court interpreted section 832.8's definition as limited to this enumerated information. Id. at 293. The information sought -- peace officer names, employing departments, and dates of employment did not constitute "personal data" protected by section 832.8. Id. at 296, 299. Without section 832.8's confidentiality protection, the court assumed that the information may be characterized was "personnel...or similar files." Id. at 299. The court held that the information was not subject to a blanket exemption under section 6254(c), and the mere assertion of peace officer safety was insufficient to preclude disclosure. Id. at 302. The agency could attempt to justify non-disclosure for particular peace officers on a case-by case basis. Id. at 303.

In Int'l. Federation, the California Supreme Court addressed a CPRA request for the names and salaries of public employees, including peace officers, making more than \$100,000 per year. 42 Cal. 4th at 327. The court rejected a police union argument that because employee salaries are calculated on a merit-based system and therefore are based in part on performance and education, a police officer's rate of earnings was a "personnel record." Id. at 343-44. Again

¹¹In 2010, the Times used the student CST scores from each teacher's classroom to compile its own value-added metric. The Times' metric differs from the Districts' metric in the factors considered and the District's statistical equation applied to them.

considering Penal Code sections 832.7 and 832.8, the court held that these provisions “do not mandate that city payroll records reflecting peace officer salary information be excluded from disclosure merely because some of the facts relied upon in determining the amount of the salary may be recorded in the agency’s personnel files.” *Id.* at 344.

The *Int’l Federation* court also noted with approval an appellate holding in *San Diego Union v. City Council*, (1983) 146 Cal.App.3d 947, which analogized the CPRA to the Brown Act (Gov’t Code § 54957) (governing public access to local agency meetings), and required that a city council discuss employee performance in closed session but discuss any salary increase for those employees in open session. *Id.* at 333-34. Although the Times relies on this case (Op. Br. at 5), it actually supports a conclusion that employee performance records are personal in nature.¹²

In sum, the better approach under *Rose* and *Washington Post* is to assume that teacher AGT scores are part of the teacher’s personnel file or other similar file for purposes of evaluating the privacy balancing of section 6254(c).

b. Do the Teachers Have a Reasonable Expectation of Privacy?

The District’s teachers have a constitutional right to privacy, and a statutory protection in section 6254(c). Section 6254(c) shields highly personal information on file with the agency, and typically applies to “sensitive personal information which individuals must submit to government.” *San Gabriel Tribune v. Superior Court*, (1983) 143 Cal.App.3d 762, 777 (disclosure of financial data submitted by refuse company for rate increase). In determining whether personnel records should be disclosed, the court must determine whether disclosure would compromise substantial privacy interests of LAUSD teachers. If their privacy interests are *de minimis*, then any disclosure could not be a “clearly unwarranted invasion of personal privacy.” *See BRV, Inc. v. Superior Court*, (2006) 143 Cal. App. 4th 742, 755.

In *POST*, the California Supreme Court rejected an attempt to shield the identity of California’s peace officers, explaining that the typical peace officer has no more than an insubstantial privacy interest in the fact of his employment as a peace officer. 42 Cal. 4th at 299-300. A particular class of information is private when well-established social norms recognize the need to maximize individual control over its dissemination to prevent unjustified embarrassment. *Id.* at 300 (citation omitted). While individuals generally have some privacy interest in controlling the dissemination of personal information, the court did not view the fact of public employment as a personal matter. *Ibid.* It found no well-established social norm protecting the identity of peace officers, who operate in a public realm and identify themselves to the public daily. *Id.* at 301.

In *Int’l Federation*, the California Supreme Court rejected a city’s claim that employee

¹²Finally, the Times relies on a New York case, *Mulgrew v. Board of Education of City School District of City of New York*, (“*Mulgrew*”) (2012) 31 Misc.3d 296, 919 N.E.2d 786, which held that the release of value-added teacher reports was not an unwarranted invasion of privacy. *Mulgrew* found that the agency could reasonably conclude that the reports were statistical tabulations of data which must be released; it did not consider whether the reports were part of a personnel file. *See id.* at 300.

salary information is private as unreasonable. 42 Cal.4th at 331. The court reiterated that reasonable expectation of privacy is an objective entitlement founded on widely accepted community norms. *Ibid.* Disclosure of salary information had been a long-held public practice of state and local government and overwhelmingly the norm. *Id.* at 330-31. In the analogous Brown Act context, a city council was required to discuss salary increases in open session. *Id.* at 333-34. As a result, section 6254(c) did not create a blanket exemption for disclosure of this information. *Id.* at 337.¹³

Under POST and Int'l Federation, the District and Union must demonstrate that well-established social norms recognize that teachers should have control over the dissemination of the District's AGT scores. These norms exist for performance evaluations which contain an assessment of work performance because the "disclosure of negative comments or information about an employee...could be embarrassing and painful to the employee." See Metropolitan Life Insurance Co. v. Utery, (D.D.C. 1976) 426 F.Supp. 150, 168. The social norms exist for an employee's personal performance goals because this information, favorable or unfavorable, could place the employee in an embarrassing position with other employees. Versaci, *supra*, 127 Cal.App.4th at 820.

Whether a social norm exists for teachers to prevent disclosure of their AGT scores depends on the nature of those scores.

In Mulgrew, *supra*, 31 Misc.3d at 296, the supreme court of New York (trial court) considered the state department of education's decision to release teacher data reports to the public under New York's Freedom of Information Law. *Id.* at 298. These reports were predictors of student improvement on test scores, and hence were used to determine the "valued added" by the teacher. *Ibid.* The court concluded that the department's decision that the reports were statistical tabulations of publicly available data was not arbitrary and capricious. *Id.* at 299. The teacher's union's contention that the reports were so flawed and unreliable as to be subjective lacked merit because the law does not require information to be reliable to be disclosed. "[F]actual data...simply means objective information, in contrast to opinions, ideas or advice..." *Ibid.* (quoting Guold v. New York City Police Dept., (1996) 89 N.Y.2d 267, 276). Compare Elentuck v. Green (1994) 608 N.Y.S.2d 701 (lesson observation reports were not statistical or factual data required to be disclosed).

The court agrees with Mulgrew's implicit analysis of the social norm. That is, a document containing advice, criticism, evaluation, or recommendations for a teacher and prepared by a supervisor is protected by social norms which recognize that teachers should have control over their dissemination. This information, favorable or unfavorable, contains personal information which could place the employee in an embarrassing position with other employees. In contrast, statistical tabulations of data concerning student performance in a teacher's class, information which is publicly available, is merely objective information over which no social norm suggests a teacher should have control. Any embarrassment to a teacher from such disclosure is not a protected privacy interest.

The question becomes: Are the AGT scores statistical tabulations of publicly available

¹³Although claims for exemption in a particular case could be considered, no such evidence had been presented. *Ibid.*

data, or are they subjective assessments of teacher performance?

The District presents evidence that AGT is a statistical model using a student's CST scores combined with his or her demographic data to create individual student growth predictions, which are "customized" to the students each teacher serves. Lim Decl., ¶¶ 3-4.¹⁴ The predicted results are compared to the actual student results to calculate the teacher's value-added estimate. Lim Decl., ¶4. Each teacher is given an overall rating from 1-5 for the school year, an overall AGT score based on the average for the last three years, and a color-coded rating. Lim Decl., ¶5-6. The District does not explain how the teacher rating is calculated.

The Union's expert, Rothstein, acknowledges that value-added models are statistical methods that attempt to measure teacher effectiveness. Rothstein Decl., ¶¶ 8-9. Value-added models assume that, once the controlled variables are eliminated, any variation in student end-of-year outcomes is due to the teacher. Rothstein Decl., ¶10. He opines that AGT is a specific implementation of a value-added model, and criticizes all such models as volatile, sensitive to differences in teacher focus, and limited in value. Rothstein Decl., ¶¶ 11-13, 15. He does not dispute, however, that AGT is an attempt to demonstrate teacher effectiveness through statistical, factual analysis.

The evidence submitted by the District and UTLA confirms that AGT is a statistical model which tabulates publicly available information. There is no evidence that the model of predicted student performance, or the teacher rating, is a subjective comment or evaluation of the teacher.¹⁵ This is critical to the issue of social norm.¹⁶ Without evidence that the teacher's AGT report contains advice, criticism, evaluation, or recommendations, it is a statistical tabulation of data over which the teacher should have no control.

When the fact that AGT is a statistical model tabulating publicly available information of student performance is coupled with the facts that the teacher's AGT report contains no personal or intimate information about the teacher and that the report is not used in the teacher's annual performance evaluation, the District's teachers have no reasonable expectation of privacy in their AGT score.

The District relies on the analogous Brown Act and its personnel exception (§54959(b)),

¹⁴A sample teacher AGT report states that the AGT model uses statistical techniques to separate the impact of school from other factors. Variables considered include: (1) prior CST scores, (2) grade level, (3) gender, (4) race/ethnicity, (5) low-income status, (6) English language learner status, (7) "SPED Status," (8) continuous enrollment, and (9) homelessness. Lim Decl., Ex.1.

¹⁵LAUSD's opposition argues that the ratings and color-coding are subjective (Dist. Opp. at 5), but these are merely labels attached to objective scores, not subjective evaluations.

¹⁶The District and UTLA present considerable evidence of teacher embarrassment, jealousy, and unhealthy comparisons which may result from disclosure. These are serious harms, but they do not create a social norm for a teacher to control disclosure of statistical information where none existed before; embarrassment alone cannot create a protected privacy interest. See *Int'l Federation, supra*, 42 Cal.4th at 331.

which permits a local agency to hold a closed session to consider personnel matters, including employee evaluations. See Morrow v. Los Angeles Unified School District, (2007) 149 Cal.App.4th 1424, 1438-39. The District relies on Duval v. Board of Trustees, (“Duval”) (2001) 93 Cal.App.4th 902, 909, and argues that the personnel exception permits an agency to consider the criteria and process for conducting an evaluation in closed session. Dist. Opp. at 8.

Duval merely held that the scope of evaluation of an employee’s job performance which may be considered in closed session includes preliminary considerations, such as the selection of evaluation criteria, fact-gathering mechanism, and areas of emphasis, for the particular employee. Id. at 909. It did not hold that public facts and their statistical manipulation, which are not considered as part of the employee evaluation, may somehow be presented in closed session.

Finally, the District relies on its notice to teachers and agreement with the Union that it would keep teacher AGT scores private. Opp. at 6. The District’s treatment of this information as confidential does not transform information which should otherwise be disclosed; CPRA disclosure cannot depend on the particular practice of the agency in question. See Int’l Federation, *supra*, 42 Cal.4th at 336. The District’s treatment of AGT scores which it created as private is distinguishable from a circumstance in which an agency obtains information from an employee based on a promise of maintaining its confidentiality. See Wilson v. Superior Court, (1996) 51 Cal.App.4th 1136, 1143 (applications for appointment to board of supervisor’s vacancy were exempted under section 6254(c) in part because they were submitted to governor with assurance of confidentiality).

The District and UTLA have failed to meet their burden of showing that District teachers have a protected privacy interest in their AGT scores that is not *de minimis*, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

c. Do LAUSD and UTLA Establish That the Privacy Interest in Withholding AGT Scores Clearly Outweighs Public Access?

Even if the court were to assume that the District’s teachers have a reasonable expectation of privacy in the statistical calculation which is an AGT score, the balancing of that privacy interest does not clearly outweigh the public interest in disclosure.¹⁷

The public has a strong interest in disclosure of teacher AGT scores. Teacher AGT scores are compiled by the District at taxpayer expense, and reflect the performance of students in the classroom of public school teachers. They are intended to provide an objective measure of student performance and teacher success. The public has a general interest in all educational issues. Standardized testing and an objective valuation of teacher performance is particularly topical for all educators, parents, students, and the general public. Parents, the public, schools, and teachers have an interest in obtaining complete information so that they can evaluate student performance and use the District’s value-added metric as a measure of success.

(i) Other Alternatives

The District argues that the public interest in teacher AGT scores can be advanced by

¹⁷The catch-all exception in section 6255 supplies a slightly different test -- whether the public interest in non-disclosure clearly outweighs the public interest in disclosure.

other means than disclosure. Dist. Opp. at 10. LAUSD notes that the public already receives AGT results for schools, as well as for grades 2-11, all subjects with CST scores, and teachers without their names. *Ibid.* The District argues that a parent easily could evaluate his or her child's progress by looking at the child's CST score, meeting with teachers, and looking at school AGT scores. *Ibid.*

The availability of this information mitigates to some extent the public interest in teacher AGT results. See *Versaci, supra*, 127 Cal.App.4th at 820. However, there should be an array of information available to a parent and the public concerning student performance, and teacher AGT scores are simply one tool in the toolbox. As the Times argues, value-added information still is necessary on a teacher level despite the availability of other information. See Reply at 8. The teacher scores relate directly to their classroom performance. "[B]ecause there is greater variation in the quality of instruction within schools than between them, it is essential to report data at the classroom level for evaluation purposes." Times Ex. GO at 180.

Moreover, the District's argument fails to address AGT's scoring of teacher effectiveness. The District believes AGT scores are a useful tool to aid understanding of teacher effectiveness based on student achievement in the classroom. The public (and the Times) are entitled to seek teacher AGT scores to evaluate this very purpose, even if UTLA does not agree that they show teacher effectiveness and the Agreement permits their use only to provide perspective. See *Los Angeles v. Superior Court*, (2012) 211 Cal. App. 4th 57, 63 (purpose for which information is sought or will be used is not a basis to refuse to provide public records).

The value-added scores prepared by the Times' expert are not a substitute for LAUSD's AGT scores. The District's Superintendent stated publicly that LAUSD uses a different model to calculate its AGT scores than the Times, suggesting that its AGT scores are more reliable than the Times' metric. See Times Ex. B. The public has a strong interest in disclosure of the District's AGT scores for teachers.

(ii) Reliability

UTLA argues that there is no public interest in disclosure, contending that AGT, like all value-added metrics, is stigmatizing, unreliable, incomplete, and misleading, the disclosure of which would be poor public policy. UTLA Opp. at 7-14.

UTLA contends that value-added models generally are flawed, and there is a disconnect between what they and other measures of teacher performance assess. As Rothstein explains, value-added models do not adequately account for all variables that can influence CST scores, such as the number of ELL students in a classroom, and the effects of different types of disabilities. Although there is a debate as to the degree in which value-added scores are a distorted measure of teacher performance, there is widespread agreement that all value-added metrics suffer from these defects. Even the Times concedes that there is "little if any evidence that the scores ha[ve] value as indicators of a teacher's work."

The Times disagrees, and replies that many studies have found that value-added scores are a reliable indicia of teacher effectiveness. Teachers with high value-added scores improve the chances of student success, and a December 2011 study which found a direct correlation between teachers who raise their students' scores on standardized tests and the students' ultimate earning capabilities. Even if experts do not all agree on the best use of value-added data, the

studies showing a strong correlation between value-added scores and student performance undeniably make the scores a matter of public interest. Times Reply at 9.¹⁸

The argument that the scores are too unreliable to be useful is contradicted by the Agreement in which the District and Union agreed that teacher AGT scores could be used “to give perspective and to assist in reviewing the past CST results of the teacher.” The District apparently also stands behind teacher AGT scores as a measure of teacher effectiveness, and UTLA’s willingness to allow AGT scores to be used to give perspective recognizes that they have value in improving student performance.

In any event, the debate over the reliability of value-added scores generally, and over AGT specifically, does not affect the public interest in disclosure. The teacher AGT scores were developed to be an objective measure of student achievement and teacher performance. The District invested valuable resources into developing AGT for this purpose, and the public has an interest in using them for both purposes. The Agreement between the District and the Union also permits the District to use teacher AGT scores to give perspective on student CST scores as part of its commitment to find ways of improving student performance.

Thus, the public has an interest in disclosure of the scores because they reflect on both student achievement and teacher performance, as well as on LAUSD’s choices in allocating time and resources.¹⁹ See *Mulgrew, supra*, 31 Misc.3d at 300-01 (rejecting argument that value-added data should not be disclosed because of alleged lack of reliability).

(iii) Incomplete

UTLA presents expert evidence from Rothstein that there is a consensus among education experts that value-added measures should not be viewed in isolation to evaluate teacher performance. No value-added model, the AGT included, has been shown to completely distinguish teachers’ impact on student performance from the myriad other factors that do so. In other words, disclosure of the AGT scores would be misleading not merely because they are inaccurate, but because they are incomplete. UTLA Opp. at 12.

The court accepts the undisputed evidence that value-added measures alone are an

¹⁸On the issue of when debatable facts are subject to disclosure, both the Times (Times Reply at 10-11) and UTLA (UTLA Opp. at 15) cite cases in which a complaint against a public employee with a substantial factual basis was disclosed because the public has an interest in evaluating how the agency investigates and treats such matters. See, e.g., *BRV, Inc. v. Superior Court*, (2006) 143 Cal.App.4th 742, 757-59 (disclosure of report tending to exonerate school district superintendent); *Marken v. Santa Monica-Malibu Unified School District*, (2012) 202 Cal.App.4th 1250, 1274-76 (disclosure of sexual harassment complaint). These cases are not particularly germane because they concern the investigation of complaints against an employee, not evaluation of the employee’s job performance.

¹⁹The assertion that AGT scores are not a valid measure is too narrow in its focus on teachers alone. The public has an interest in assessing the District as well as its teachers. Access to the scores will help the public understand and monitor LAUSD’s decision to invest time and effort into AGT.

incomplete means of determining teacher effectiveness. But the Times is not advocating for the release of teacher AGT scores to the exclusion of all other evaluative criteria. As discussed *supra*, teacher scores are but one tool in the parent toolbox along with CST scores, school-level and class-specific AGT scores, parent/teacher meetings, and more. Vigorous public debate about whether teacher AGT scores are useful is to be encouraged, not stifled.

(iv) Misleading

Rothstein opines, and the Union contends, that flaws in the value-added model make clear that disclosure would not “shed light” on the District’s “performance of its duty,” but would mislead the public as to teacher effectiveness by providing inaccurate and incomplete information. The misleading nature of the scores would be exacerbated by their expression as numbers, which inherently appear to be scientific, objective and accurate, inspiring unwarranted credence. *See* UTLA Opp. at 12.

The Times contends that UTLA’s position -- AGT scores lack public value because they could be misunderstood -- is an elitist view that also suffers from the defect that more, not less, information may be needed. A public entity cannot withhold public records by asserting that the public will not understand them. If LAUSD believes that additional information should be provided that will place teacher AGT scores in context, then it should do so. Times Reply at 9.

The court agrees with the Times. The position that AGT scores lack public value because they could be misunderstood simply does not yield a basis for withholding them. The remedy is to disclose more information, not less, to place the AGT scores in context. Additionally, the opinion that AGT is misleading is itself subject to the criticism that it is speculative.

(v) Stigma

Both the District and Union express concern that disclosure of AGT scores showing teachers to be ineffective will be embarrassing and create jealousy. UTLA argues that disclosure of the AGT scores will go “beyond mere embarrassment” for teachers and will be “highly offensive,” publicly stigmatizing teachers with low scores as “ineffective.” It will further affect teacher morale, which has already at its lowest level in 25 years. In this regard, the Times’ 2010 and 2011 publication of its value-added scores was devastating to LAUSD teachers. It was aggravated by the Times assertion of the primacy of the value-added model, claiming that “[m]any of the factors commonly assumed to be important to teachers’ effectiveness were not,” and the value-added model shows that “[a]lthough teachers are paid more for experience, education and training, none of this had much bearing on whether they improved student performance.” UTLA Opp. at 7-8.

To some extent, prediction of harm to teachers from disclosure of AGT scores is speculative. For example, the assertion that teacher satisfaction will be reduced by disclosure of AGT scores is unsupported, relying only on a Metlife teacher satisfaction study that shows teacher satisfaction decreased in 2008 because of the recession.

Nevertheless, there is admissible evidence from expert opinion, the concern of the District’s Superintendent, and the impact on specific teachers of the Times’ value-added assessment. This evidence shows a real concern of embarrassment and jealousy from disclosure of the scores. Public embarrassment is a legitimate factor in the balancing test where an

individual has a reasonable expectation of privacy. See *Int'l Federation, supra*, 42 Cal.4th at 331.

The concerns about teacher embarrassment and stigma are insufficient to prevent disclosure of AGT scores. To the extent teachers may expect their AGT scores to remain private, that expectation is not reasonable as discussed *supra*. Accordingly, it is given diminished weight in the balancing test. See *ibid.* Teachers simply cannot reasonably expect the objective scoring of their students' performance and allegedly their own effectiveness to be private.

Additionally, the arguments of extreme embarrassment and stigma are undermined by the fact that the Times published its value-added study. Some teachers were embarrassed by their low scores, but there was no wild reaction of jealousy from other teachers or outrage by parents against teachers with poor value-added scores. Public employment requires accountability, and a concern that some teachers may be embarrassed does not overcome the public's strong interest in obtaining identifying information for AGT scores.

(vi) Poor Public Policy

Rothstein notes that "few if any" experts consider the public release of value-added scores to be good public policy. He explains that disclosure of teachers' AGT scores to the public will create undesirable incentives for teachers and make the CST itself less reliable and useful. Pursuant to Campbell's Law, the "corruption pressures" that result from an emphasis on test scores will encourage behaviors that will decrease the quality of education, such as (1) teachers no longer volunteering to teach certain groups of students, such as English Language Learners and students with disabilities, who do not tend to perform well on CSTs, resulting in lower AGT scores for teachers who teach a disproportionate number of such students; (2) teachers "teaching to the test," instead of devoting time to subjects and critical thinking skills not covered by the CST; and (3) teachers, principals and administrators "gaming" the system. UTLA Opp. at 13.

The Times responds that the claim that release of AGT scores will result in cheating and gaming the system reflects a cynical view of the teaching profession and a surprising disdain for teachers. Times Reply at 14.

The simple answer is that the court does not set public policy, good or bad. The court follows the law, in this case the CPRA, in which the Legislature set public policy. The CPRA sets forth a strong public policy of public record disclosure. If disclosure of the teacher AGT scores will lead to corruption pressures, and those pressures are sufficiently destructive, then the Legislature may amend the Education Code to preclude disclosure of AGT information. This is what the State of New York did in response to *Mulgrew*.²⁰

In sum, the District and UTLA have failed to meet their burden of showing that the balancing of the privacy interest of District teachers clearly outweighs the public interest in disclosure of teacher AGT scores.

²⁰The argument on corruption pressures is flawed in that these teacher behaviors, to the extent they exist, arise not only from AGT scores but also from the Times' value-added scores and CSTs generally. It may also be true that teachers learn about each other's AGT scores, in which case the corruption pressures exist whether or not the scores are publicly disclosed.

2. The Catch-All Exemption

The District also contends that teacher AGT scores are exempt from disclosure under section 6255, which exempts records when “based on the facts of the particular case, the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”

The District argues that the public interest served by not disclosing records includes: (1) retaining effective teachers, (2) balancing teaching assignments among teachers, (3) workplace harmony and avoiding discord, (4) upholding teacher authority, and (5) integrity of the dismissal process. Dist. Opp. at 12-14. The Times does not address this argument.

The court addressed the public interest in disclosure *supra*. As for the public interest in non-disclosure, most of the District’s arguments were addressed with respect to the balancing test under section 6254(c). Virtually all of the arguments are supported only by speculation, not evidence.

In any event, the District’s public policy argument concerning the recruiting and retention of effective teachers assumes that other school districts do not and will not have a value-added model for their teachers. The court cannot make this assumption, or that those districts will not be required to disclose their value-added results. Competition between districts for good teachers is hardly bad public policy.

The District’s argument concerning balanced teaching assignments, teacher authority, and unhealthy workplace discord was addressed *supra*. The Times’ 2010 value-added results belie these concerns.

Finally, the argument concerning teacher discipline -- that teachers would seek to introduce the AGT scores of other teachers for disparate treatment claims -- is unsupportable. The District is simply contending that an accused teacher may use the records as evidence. To the extent that the AGT score is not sufficiently reliable or should be excluded, these issues can be addressed in the disciplinary hearing.

The District has not met its burden of showing that the public interest in non-disclosure clearly outweighs the public interest in disclosure of teacher AGT scores.

E. Conclusion

The petition for writ of mandate is granted. Under section 6254(c), the court has assumed that teacher AGT scores are part of the teacher’s personnel file or other similar file. The District and UTLA have failed to meet their burden of showing that District teachers have a protected privacy interest in their AGT scores. They also have not shown that balancing of the privacy interest clearly outweighs the public interest in disclosure of teacher AGT scores. Under section 6255, the District has not shown that the public interest in non-disclosure clearly outweighs the public interest in disclosure of teacher AGT scores.

The Times’ counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on counsel for the opposing parties for approval as to form, wait 10 days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment is set for August 27, 2013 at 1:30 p.m.